

**EXHIBIT NO. 21**

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**United States Code**  
**TITLE 29 - LABOR**  
**CHAPTER 11 - LABOR-MANAGEMENT REPORTING AND DISCLOSURE**  
**PROCEDURE**  
**SUBCHAPTER III - REPORTING BY LABOR ORGANIZATIONS, OFFICERS**  
**AND EMPLOYEES OF LABOR ORGANIZATIONS, AND EMPLOYERS**

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Section 440. Civil action for enforcement by Secretary; jurisdiction

Whenever it shall appear that any person has violated or is about to violate any of the provisions of this subchapter, the Secretary may bring a civil action for such relief (including injunctions) as may be appropriate. Any such action may be brought in the district court of the United States where the violation occurred or, at the option of the parties, in the United States District Court for the District of Columbia.

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**Section 441. Surety company reports; contents; waiver or modification of requirements respecting contents of reports**

Each surety company which issues any bond required by this chapter or the Employee Retirement Income Security Act of 1974 [29 U.S.C. 1001 et seq.] shall file annually with the Secretary, with respect to each fiscal year during which any such bond was in force, a report, in such form and detail as he may prescribe by regulation, filed by the president and treasurer or corresponding principal officers of the surety company, describing its bond experience under each such chapter or Act, including information as to the premiums received, total claims paid, amounts recovered by way of subrogation, administrative and legal expenses and such related data and information as the Secretary shall determine to be necessary in the public interest and to carry out the policy of the chapter. Notwithstanding the foregoing, if the Secretary finds that any such specific information cannot be practicably ascertained or would be uninformative, the Secretary may modify or waive the requirement for such information.

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**United States Code**  
**TITLE 29 - LABOR**  
**CHAPTER 11 - LABOR-MANAGEMENT REPORTING AND DISCLOSURE**  
**PROCEDURE**  
**SUBCHAPTER IV - TRUSTEESHIPS**

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**Section 464. Civil action for enforcement**

(a) Complaint; investigation; commencement of action by Secretary, member or subordinate body of labor organization; jurisdiction

Upon the written complaint of any member or subordinate body of a labor organization alleging that such organization has violated the provisions of this subchapter (except section 461 of this title) the Secretary shall investigate the complaint and if the Secretary finds probable cause to believe that such violation has occurred and has not been remedied he shall, without disclosing the identity of the complainant, bring a civil action in any district court of the United States having jurisdiction of the labor organization for such relief (including injunctions) as may be appropriate. Any member or subordinate body of a labor organization affected by any violation of this subchapter (except section 461 of this title) may bring a civil action in any district court of the United States having jurisdiction of the labor organization for such relief (including injunctions) as may be appropriate.

(b) Venue

For the purpose of actions under this section, district courts of the United States shall be deemed to have jurisdiction of a labor organization (1) in the district in which the principal office of such labor organization is located, or (2) in any district in which its duly authorized officers or agents are engaged in conducting the affairs of the trusteeship.

(c) Presumptions of validity or invalidity of trusteeship

In any proceeding pursuant to this section a trusteeship established by a labor organization in conformity with the procedural requirements of its constitution and bylaws and authorized or ratified after a fair hearing either before the executive board or before such other body as may be provided in accordance with its constitution or bylaws shall be presumed valid for a period of eighteen months from the date of its establishment and shall not be subject to attack during such period except upon clear and convincing proof that the trusteeship was not established

or maintained in good faith for a purpose allowable under section 462 of this title. After the expiration of eighteen months the trusteeship shall be presumed invalid in any such proceeding and its discontinuance shall be decreed unless the labor organization shall show by clear and convincing proof that the continuation of the trusteeship is necessary for a purpose allowable under section 462 of this title. In the latter event the court may dismiss the complaint or retain jurisdiction of the cause on such conditions and for such period as it deems appropriate.

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EXHIBIT NO. 22

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**United States Code**  
**TITLE 29 - LABOR**  
**CHAPTER 11 - LABOR-MANAGEMENT REPORTING AND DISCLOSURE**  
**PROCEDURE**  
**SUBCHAPTER II - BILL OF RIGHTS OF MEMBERS OF LABOR**  
**ORGANIZATIONS**

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**Section 412. Civil action for infringement of rights; jurisdiction**

Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

EXHIBIT NO. 23



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**United States Code**  
**TITLE 18 - CRIMES AND CRIMINAL PROCEDURE**  
**PART I - CRIMES**  
**CHAPTER 95 - RACKETEERING**

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**Section 1954. Offer, acceptance, or solicitation to influence operations of employee benefit plan**

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Whoever being -

(1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or

(2) an officer, counsel, agent, or employee of an employer or an employer any of whose employees are covered by such plan; or

(3) an officer, counsel, agent, or employee of an employee organization any of whose members are covered by such plan; or

(4) a person who, or an officer, counsel, agent, or employee of an organization which, provides benefit plan services to such plan receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of the actions, decisions, or other duties relating to any question or matter concerning such plan or any person who directly or indirectly gives or offers, or promises to give or offer, any fee, kickback, commission, gift, loan, money, or thing of value prohibited by this section, shall be fined under this title or imprisoned not more than three years, or both: Provided, That this section shall not prohibit the payment to or acceptance by any person of bona fide salary, compensation, or other payments made for goods or facilities actually furnished or for services actually performed in the regular course of his duties as such person, administrator, officer, trustee, custodian, counsel, agent, or employee of such plan, employer, employee organization, or organization providing benefit plan services to such plan.

As used in this section, the term (a) "any employee welfare benefit plan" or "employee pension benefit plan" means any employee welfare benefit plan or employee pension benefit plan, respectively, subject to any provision of title I of the Employee Retirement Income Security Act of 1974, and (b) "employee organization" and "administrator" as defined respectively in sections 3(4) and (3)(16) of the Employee Retirement Income Security Act of 1974.

**EXHIBIT NO. 24**

Not Reported in F.Supp.2d, 2005 WL 711977 (N.D.Ill.), RICO Bus.Disp.Guide 10,861

**Motions, Pleadings and Filings**

United States District Court,  
N.D. Illinois, Eastern Division.  
THE BOARD OF TRUSTEES OF THE IRONWORKERS LOCAL NO. 498 PENSION FUND, The Board  
of Trustees of the Ironworkers Local 498 Defined Contribution Retirement Fund,  
and the Board of Trustees of the Sheet Metal Workers Local 218S Pension Fund,  
Plaintiffs,

v.

NATIONWIDE LIFE INSURANCE COMPANY, Nationwide Financial Services, Inc.,  
Nationwide Trust Company, FSB, Nationwide Financial Institution Distributors  
Agency, Inc., and Nationwide Investment Services Corp., Defendants.

No. 04 C 821.

March 28, 2005.

Pasquale Angelo Fioretto, Beverly Pazon Alfon, Brian C. Hlavin, Catherine Marie Chapman, Patrick  
Nolan Ryan, Baum, Sigman, Auerbach, Pierson, Neuman & Katsaros, Ltd., Chicago, IL, for Plaintiffs.  
James H. Mutchnik, Andrew Paul Bautista, Petra Renee Wicklund, Thomas L. Campbell, Kirkland &  
Ellis LLP, Chicago, IL, for Defendants.

**MEMORANDUM OPINION AND ORDER**

**GUZMÁN, J.**

\*1 The Board of Trustees of the Ironworkers Local No. 498 Pension Fund ("498 DB Fund"), the Board of Trustees of the Ironworkers Local No. 498 Defined Contribution Fund ("498 DC Fund"), and the Board of Trustees of the Sheet Metal Workers Local 218S Pension ("218S Fund") have sued Nationwide Life Insurance Co. ("NLIC"), Nationwide Financial Services, Inc. ("NFS"), Nationwide Trust Co. ("NTC"), and Nationwide Financial Institution Distributors Agency, Inc. ("NFIDA") for violation of the Racketeering Influence and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* and rescission of contracts with NLIC. Before this Court is Defendants' motion to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(6). In the alternative, Defendants move to stay the action pending the resolution of related criminal proceedings. For the reasons provided in this Memorandum Opinion and Order, the Court grants in part and denies in part the motion to dismiss and denies the motion to stay.

**FACTS**

Plaintiffs had alleged contracts with NLIC to invest money with Defendants. (Compl. ¶ 8.) Plaintiffs allege that Defendants acted to deprive them of money, which should have been invested on their behalf, through a scheme in which Defendants deducted money from fund assets and paid fees, kickbacks, and commissions to third-party administrators, Michael G. Linder, Liz/Mar ("Liz/Mar") and Associates, Inc., and/or Joseph/Anthony and Associates, Inc. ("Joseph/Anthony"), in return for Linder's recommendation that the Plaintiffs invest their assets with Defendants. (*Id.* ¶ 13.) Plaintiffs also allege that the contracts with the Defendants were entered into without Plaintiffs' knowledge that Linder had an undisclosed broker relationship with Defendants and that the fees which Defendants took from the individual participant accounts were used by Defendants to pay themselves for whatever services they claimed to be performing, with the additional fees used to pay commissions, kickbacks and fees to Linder, Joseph/Anthony, and/or Liz/Mar. (*Id.* ¶¶ 23, 55.) Furthermore, the Funds allege that the signature on the contracts were unauthorized and unauthentic. (*Id.* ¶¶ 30, 62, 76.)

One of the alleged contracts required Defendants to pay commissions to Linder. (*Id.* ¶ 31.) However, the other contracts required Defendants to pay commissions to Joseph/Anthony or Liz/Mar, either of which then passed the funds to Linder. (*Id.* ¶¶ 32, 63.) Defendants, in order to assist Linder in hiding the scheme, agreed to Linder's requests that all documentation regarding his compensation be directed solely to him without any information sent to the Fund Trustees. (*Id.* ¶ 32.) Eventually, the Funds requested an accounting from Linder, which revealed that Linder had collected total fees exceeding the *bona fide* compensation which the Fund Trustees agreed that Linder, Joseph/Anthony,

and Liz/Mar were entitled to receive. (*Id.* ¶¶ 33, 45, 65, 68, 79.)

\*2 Around November 2001, Plaintiffs decided to terminate the services of Linder, Joseph/Anthony, and Liz/Mar, and hired Zenith Administrators, Inc. ("Zenith") as the new third-party administrator. (*Id.* ¶¶ 36, 66.) Rita Becker, a Zenith employee, contacted Corey Harber, a Nationwide account manager in Columbus, Ohio, to introduce herself as the new administrator of the Funds. (*Id.* ¶ 36.) Harber told Becker that the Funds could not keep its investments with Defendants because Zenith was not a Preferred Pension Administrator, *i.e.*, a third-party administrator with whom the Defendants exclusively conducted business. (*Id.* ¶¶ 37, 66.) Harber directed Becker to another Nationwide employee, Robert Leahy, to discuss Zenith's becoming a Preferred Pension Administrator with Nationwide. (*Id.* ¶ 38.) Leahy further explained to Becker that Defendants expected Preferred Pension Administrators to do a certain volume of business due to the "revenue sharing" that is passed on to the Preferred Pension Administrators. (*Id.* ¶¶ 41, 42.) The Plaintiffs allege that this "revenue sharing" was "merely deductions from the accounts of the [Plaintiffs'] Fund participants that Defendants paid to Linder, Joseph/Anthony and /or Liz/Mar as part of a plan or scheme to secure and ensure Linder's continued recommendation that the Trustees maintain Plaintiffs' investments with Nationwide." (*Id.* ¶ 43.)

Counts I and II of the Complaint allege violations of RICO, specifically 18 U.S.C. § 1962(a) and (c). In Count I, Plaintiffs allege, among other things, that Linder directed Plaintiffs' investments to Defendants, who charged Plaintiffs various fees. (*Id.* ¶¶ 98-99.) From these fees, Defendants paid kickbacks and commissions to Linder, Joseph/Anthony, and Liz/Mar. (*Id.*) In Count II, Plaintiffs allege that Defendants violated 18 U.S.C. § 1962(a) by wrongfully depriving the Plaintiffs of moneys to which they were entitled. (*Id.* ¶ 114.) Plaintiffs contend that this money should have been invested on their behalf, but instead the money was illegally given to Linder, Joseph/Anthony, and Liz/Mar. (*Id.*) Plaintiffs also ask that their contracts with Defendants be rescinded due to a unilateral mistake of fact and that each party be returned to their status *quo ante*. (*Id.* ¶¶ 116-38.)

#### DISCUSSION

##### I. Count I: RICO Claim Pursuant to 18 U.S.C. § 1962(c)

The first issue is whether Plaintiffs must plead a violation of 18 U.S.C. § 1962(c) pursuant to Rule 8 or 9(b). To state a claim under 18 U.S.C. § 1962(c), a plaintiff must allege: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985). A pattern of racketeering activity, elements (3) and (4), includes at least two predicate RICO acts committed within a ten-year period. 18 U.S.C. § 1961(5); see Goren v. New Vision Int'l, Inc., 156 F.3d 721, 728 (7th Cir.1998). These predicate racketeering acts are specifically enumerated in 18 U.S.C. § 1961(1) and include unlawful employee pension fund payments, indictable under 18 U.S.C. § 1954, and embezzlement from pension and welfare funds, indictable under 18 U.S.C. § 664, which are the predicate acts alleged in the instant case. See 18 U.S.C. § 1961(1).

\*3 Defendants argue that Plaintiffs cannot rely on "boilerplate" allegations and must plead with particularity facts that support each element of a RICO claim, citing Goren v. New Vision International, Inc., 156 F.3d at 727. Defendants' reliance on Goren, however, is misplaced because the plaintiffs in that case alleged the predicate acts of mail and wire fraud, and therefore the allegations were subject to the heightened pleading requirements of Rule 9(b), rather than the more liberal standards of Rule 8. See *id.* at 729. Thus, Goren does not require this Court to apply Rule 9 (b)'s pleading standard to predicate acts that do not allege fraud.

Defendants fail to provide, and the Court has not found, any authority to support the contention that RICO complaints alleging predicate acts of embezzlement from pension and welfare funds, see 18 U.S.C. § 664, or unlawful employee pension fund payments, see 18 U.S.C. § 1954, must meet the heightened pleading standard for fraud under Rule 9(b). In fact, cases decided in this district and elsewhere have declined to apply Rule 9(b) to RICO claims pleading embezzlement under 18 U.S.C. § 664 as a predicate act. Daniels v. Bursey, 313 F.Supp.2d 790, 815 (N.D.Ill.2004); Nystrom v. Associated Plastic Fabricators, Inc., Nos. 98 C 134, 98 C 4282, 1999 WL 417848, at \*9 (N.D.Ill. June 18, 1999); Am. Tel. & Tel. Co. v. Empire Blue Cross & Blue Shield, No. Civ. 93-1224, 1994 WL 16057794, at \*22 (D.N.J. July 19, 1994). In addition, at least one court has declined to apply Rule 9 (b) to a RICO claim alleging unlawful employee pension fund payments under 18 U.S.C. § 1954 as a predicate act. Nat'l Elec. Benefit Fund v. Heary Bros. Lightning Protection Co., 931 F.Supp. 169, 191 (W.D.N.Y.1995). Finding these cases persuasive, this Court holds that allegations of the predicate acts of embezzlement and unlawful employee pension fund payments do not involve averments of fraud within the meaning of Rule 9(b). Thus, the Court will evaluate Plaintiffs' RICO claims under Rule 8.

Pursuant to Rule 8(a)(2), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Under this liberal notice pleading standard, "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (internal quotations omitted). Moreover, the court must accept all well-pleaded factual allegations in the light most favorable to the plaintiff. *Colfax Corp. v. Ill. State Toll Highway Auth.*, 79 F.3d 631, 632 (7th Cir.1996).

A. Plaintiffs Sufficiently Plead the Existence of an Enterprise and That Defendants Conducted, or Participated in Conducting, the Affairs of the Enterprise.

The term " 'enterprise' includes any individual, partnership, corporation, association, or other legal entity." 18 U.S.C. § 1961(4). In addition, an association in fact is a type of enterprise defined by the statute as a "union or group of individuals associated in fact although not a legal entity." *Id.*; see *Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 646 (7th Cir.1995).

\*4 Plaintiffs have alleged two possible enterprises, one consisting of Nationwide Mutual Insurance Co., which was conducted by Defendants as a vehicle for racketeering activity, (Compl.¶¶ 86, 89), and an association in fact consisting of the named Defendants, Joseph/Anthony, and other unknown third-party administrators, (*id.* ¶ 92). The Court will address each enterprise theory in turn. RICO plaintiffs must allege "the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001). " 'Person' includes any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3). Unless the defendant person and the enterprise are distinct, there can be no violation of RICO. *Baker v. IBP, Inc.*, 357 F.3d 685, 691-92 (7th Cir.2004) (citing *Sedima*, 473 U.S. at 479). Plaintiffs must allege that the "person" associated with the enterprise conducted or participated, "directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." *Richmond*, 52 F.3d at 645; 18 U.S.C. § 1962(c). A corporate subsidiary can be deemed the RICO "person" conducting the affairs of its parent, the RICO enterprise. *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 227 (7th Cir.1997). However, "[i]n order to 'participate, directly or indirectly, in the conduct of such enterprise's affairs,' one must have some part in directing those affairs." *Reves v. Ernst & Young*, 507 U.S. 170, 179, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993) (quoting 18 U.S.C. § 1962(c)).

Plaintiffs have alleged an enterprise distinct from Defendants themselves, their corporate parent, Nationwide Mutual Insurance Co. (*Id.* ¶ 86.) In addition, Plaintiffs have alleged that the Defendants "directly and/or indirectly conducted and/or participated in the conduct" of the affairs of Nationwide Mutual Insurance Company, the alleged enterprise. (*Id.* ¶ 89.)

On the issue of whether Defendants, as RICO persons, participated in the "operation or management" of Nationwide Mutual Insurance Company, the alleged RICO enterprise, Defendants argue that the complaint fatally alleges that Nationwide Mutual Insurance Co. "transacts ... business through its subsidiaries," not vice versa. (*Id.* ¶ 87.) The Court does not agree that this allegation is fatal to Plaintiffs' RICO claim. As stated, this Court may dismiss this complaint only if it is clear that no relief could be granted under any conceivable set of facts that could be proved consistent with Plaintiffs' allegations. Plaintiffs' allegations do not preclude them from showing that Nationwide Mutual Insurance Co. transacts business through its subsidiaries, as Plaintiffs allege, and that Defendants also participated in the "operation or management" of the enterprise, as required by *Reves v. Ernst & Young*, 507 U.S. at 179. Accordingly, Plaintiffs have sufficiently alleged that Nationwide Mutual Insurance Co. is an enterprise and that Defendants are RICO persons who have some part in directing its affairs.

\*5 Turning to the other enterprise theory, Plaintiffs have sufficiently alleged that the association in fact is a RICO enterprise consisting of the named Defendants, Joseph/Anthony, and other unknown third-party administrators. (Compl.¶¶ 92-93.) A RICO enterprise, including an association in fact, is "an ongoing 'structure' of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making." *Richmond*, 52 F.3d at 644. "The continuity of an informal enterprise and the differentiation among roles can provide the requisite 'structure' to prove the element of 'enterprise.'" *United States v. Rogers*, 89 F.3d 1326, 1337 (7th Cir.1996). Further, the association in fact must have "a common purpose of engaging in a course of conduct." *Id.* at 645 (citations omitted). Lastly, the defendants must have conducted or participated in the conduct of the enterprise's affairs, not just their own affairs. *Reves*, 507 U.S. at 185.

First, Plaintiffs have alleged facts consistent with an ongoing structure: Defendants' network of

Preferred Pension Administrators. (Compl. ¶ 35.) Defendants argue that Plaintiffs' allegation is the type of "nebulous, open-ended description of the enterprise" that the Seventh Circuit rejects. *Richmond*, 52 F.3d at 645. The Court disagrees. Plaintiffs allege that third-party administrators are part of the association in fact, and allege the structure of the association in fact, which was comprised of Defendants and Preferred Pension Administrators, third-party administrators with which Defendants exclusively conducted business such as Joseph/Anthony. (*Id.* ¶¶ 36-42.) Therefore, Plaintiffs' allegations of the structure of the association in fact are sufficient.

Second, Plaintiffs have alleged that Defendants, Joseph/Anthony and other unknown third-party administrators shared a common purpose. (*Id.* ¶¶ 36-42.) Specifically, Plaintiffs allege that Defendants have exclusive agreements with several select Preferred Pension Administrators that market and sell the Nationwide products. (*Id.* ¶ 37.) Defendants expect to conduct a certain volume of business with each of these Preferred Pension Administrators due to "revenue sharing" that is passed on to each Preferred Pension Administrator. (*Id.* ¶ 42.) Plaintiffs further allege that this "revenue sharing" was "merely deductions from the accounts of the Fund participants that the Nationwide Defendants paid to Linder, Joseph/Anthony and /or Liz/Mar as part of a plan or scheme to secure and ensure Linder's continued recommendation that the [Fund] Trustees maintain the Fund's investments with Nationwide." (*Id.* ¶ 43.)

Defendants argue that the parties to this business relationship, Defendants and the third-party administrators, do not share the required common purpose because one seeks to earn more and the other seeks to pay less, citing *Baker v. IBP, Inc.*, 357 F.3d at 691-92. In *Baker*, the Seventh Circuit held that there was no common purpose between the defendant company, which sought to hire aliens at lower wages, and the recruiters, who wanted to be paid more by the defendant company for finding aliens for the company to hire. *Id.* The court reasoned that the recruiters wanted to be paid more for services rendered to the defendant company, while the company wanted to pay the recruiters less. *Id.* On the other hand, in the instant case, in the "revenue sharing" scheme alleged by Plaintiffs, both Defendants and the Preferred Pension Administrators benefit because Defendants maintain the Funds' investments while Preferred Pension Administrators receive money deducted from the accounts of Fund participants. Therefore, as pleaded, this mutually beneficial revenue sharing arrangement is a sufficient allegation of a common purpose.

\*6 Third, Plaintiffs have alleged that the association in fact is organized in a manner amenable to hierarchical decision-making. (Compl. ¶¶ 36-42.) In particular, Plaintiffs allege that Defendants decided to maintain exclusive agreements with Preferred Pension Administrators while declining to conduct business with third-party administrators who were not Preferred Pension Administrators. (*Id.* ¶ 37.) Joseph/Anthony, a Preferred Pension Administrator, was aware of this arrangement. (*Id.* ¶ 38.) On the basis of these allegations, Defendants decided that they would only deal with Preferred Pension Administrators and the Plaintiffs, in order to continue dealing with the Defendants, effectively had no choice but to agree to utilize a Preferred Pension Administrator. As pleaded, this means of decision-making within the association in fact sufficiently alleges a hierarchical decision-making structure.

Finally, Plaintiffs have adequately alleged that the Defendants conducted, or participated in conducting, the affairs of the association in fact. (*Id.* ¶ 96.) Specifically, Defendants, through the association in fact, entered into contracts with various pension and welfare funds that were directed to Defendants by third-party administrators, like Joseph Anthony. (*Id.*) In order to entice third-party administrators to direct funds to Defendants, the fees which Defendants took from the individual participant accounts were used by Defendants to pay themselves for whatever services they claimed to be performing, with the additional fees used to pay commissions, kickbacks and fees to third-party administrators, like Linder, Joseph/Anthony, and/or Liz/Mar. (*Id.* ¶¶ 23, 55.) Moreover, paragraphs 36-43 of the complaint specifically allege that Defendants conducted, or participated in conducting, the affairs of the association in fact by limiting who could become part of the association in fact as a Preferred Pension Administrator, and on what terms, as well as limiting who would have access to the association in fact's services. Therefore, taking Plaintiffs' well-pleaded allegations in the light most favorable to Plaintiffs, they have adequately alleged an association in fact.

#### B. Plaintiffs Sufficiently Allege the Predicate Acts

Plaintiffs have sufficiently alleged the predicate acts required by RICO. (Com pl. ¶¶ 99-108.) A pattern of racketeering activity, as required under 18 U.S.C. § 1962(c), includes at least two predicate RICO acts committed within a ten-year period. 18 U.S.C. § 1961(5). Plaintiffs allege that Defendants violated both 18 U.S.C. § 1954 and 18 U.S.C. § 664. See 18 U.S.C. § 1961(1).

#### 1. Plaintiffs Sufficiently Allege That Defendants Violated 18 U.S.C. § 1954

Plaintiffs have sufficiently pleaded that Defendants violated 18 U.S.C. § 1954. (Compl. ¶¶ 106-08.) Section 1954 precludes both receiving and giving "any fee, kickback, commission, gift, loan, money or thing of value" to individuals with the ability, or apparent ability, to influence the operation of employee benefit plans. 18 U.S.C. § 1954. However, 18 U.S.C. § 1954 is not violated by the payment of a "bona fide salary, compensation, or other payments made for goods or facilities actually furnished or for services actually performed in the regular course of his duties." *Id.*

\*7 Defendants argue that the payments admittedly made to Linder were *bona fide*, and therefore legal, because they either were disclosed or should have been disclosed by Linder. Failure to disclose a payment precludes a finding that it was *bona fide* under section 1954. *United States v. Schwimmer*, 700 F.Supp. 104, 107 (E.D.N.Y.1988). However, Plaintiffs alleged that the commissions and fees were in fact not disclosed. (*Id.* ¶¶ 28, 33, 60, 65, 74.) Moreover, Plaintiffs' allegations in paragraphs 31 and 32 suggest that the Defendants actively participated in the non-disclosure of commissions and fees. In particular, Plaintiffs alleged that Defendants, at Linder's request, paid commissions to Liz/Mar, a sham corporation used by Linder to assist in the scheme to hide the commissions. (*Id.* ¶ 31.) Plaintiffs also allege that Defendants, in order to assist Linder in hiding the scheme, agreed to Linder's requests that all documentation regarding his compensation be directed solely to his attention and be marked personal and confidential. (*Id.* ¶ 32.) Furthermore, Plaintiffs have made numerous allegations that the payments made to Linder by the Defendants were for unlawful purposes. (*Id.* ¶¶ 14, 44, 45, 67, 68, 81-82, 103.) Also, for one of the Funds, Plaintiffs allege that the Defendants were told in advance that any contract must be "net of commissions." (*Id.* ¶ 20.) Once again, viewing these allegations in the light most favorable to the Plaintiffs, they have sufficiently pleaded that Defendants violated 18 U.S.C. § 1954.

## 2. Plaintiffs Sufficiently Allege That Defendants Violated 18 U.S.C. § 664

Plaintiffs have also sufficiently alleged that Defendants violated 18 U.S.C. § 664. Section 664 penalizes "[a]ny person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith." 18 U.S.C. § 664. Plaintiffs have alleged that Defendants "violated 18 U.S.C. § 664 by unlawfully and willfully converting moneys owned by the Funds, retaining some of that money, and paying the rest of it to Linder, Joseph/Anthony and/or Liz/Mar, in the form of unauthorized brokerage commissions and other commissions, like [Preferred Pension Administrator] fees. (Compl. ¶ 108.) Therefore, taking this allegation in the light most favorable to the Plaintiffs, they have adequately alleged a section 664 violation.

## II. Count II: RICO Claim Pursuant to 18 U.S.C. § 1962(a)

In *Vicom, Inc. v. Harbridge Merchant Services, Inc.*, the Seventh Circuit noted that in order to state a claim under 18 U.S.C. § 1962(a), "the majority of circuits hold that the use or investment of the racketeering income must proximately cause the plaintiff's injury; injury caused by the predicated racketeering acts is inadequate." 20 F.3d 771, 779 (7th Cir.1994). "Since *Vicom*, 'each court in this district addressing the issue has adopted the majority use or investment rule.'" *Carnegie v. Household Int'l, Inc.*, 220 F.R.D. 542, 546 (N.D.Ill.2004) (quoting *Shapo v. O'Shaughnessy*, 246 F.Supp.2d 935, 965 (N.D.Ill.2002)).

\*8 Plaintiffs merely allege that they were injured under 18 U.S.C. § 1962(a) in the same way that they were injured under 18 U.S.C. § 1962(c): "the Funds and their participants were wrongly deprived of moneys by the Nationwide Defendants." (Compl. ¶¶ 98, 114.) Plaintiffs concede that their injury was not caused by the use or investment of the alleged racketeering income, but instead by the racketeering acts themselves, and therefore Plaintiffs ask this Court to adopt the minority position. This Court declines to follow the minority position and adheres to the majority position because it is in keeping with the plain meaning of the statute's language: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court." 18 U.S.C. § 1964(c) (emphasis added). Due to the "by reason of" language, in order to state a claim under 18 U.S.C. § 1962(a), a plaintiff must allege "proximate causation between the § 1962(a) violation and plaintiffs' injury." *Heritage Ins. Co. of Am. v. First Nat'l Bank of Cicero*, 629 F.Supp. 1412, 1417 (N.D.Ill.1986). Plaintiffs fail to allege, or even argue, that the use or investment of the racketeering income proximately caused their injury, and thus, they lack standing to bring a claim pursuant to 18 U.S.C. § 1962(a) under the majority rule. Accordingly, the Court grants Defendants' motion to dismiss as to Count II.

## III. Counts III-V: Rescission

Defendants argue that Counts III through V must be dismissed because Plaintiffs have failed to state

claims for rescission of their contracts with NLIC. The Court disagrees.

"There are three conditions necessary before a contract will be rescinded for a mistake by one of the parties." *John J. Calnan Co. v. Talsma Builders, Inc.*, 67 Ill.2d 213, 10 Ill.Dec. 242, 367 N.E.2d 695, 698 (Ill.1977). "First, the mistake must relate to a material feature of the contract; second, it must have occurred despite the exercise of reasonable care; and third, the other party must be placed *in statu quo*." *Id.*

First, the parties do not appear to dispute that the purported mistake relates to a material feature of the contract. Second, Plaintiffs have adequately pleaded that the mistake was not a result of the Plaintiffs' lack of due care. Defendants argue that Plaintiffs never inspected the contract with NLIC, instead relying on representations made by Linder regarding the contract terms. However, Plaintiffs have alleged that NLIC willfully concealed those contract terms. (Compl.¶¶ 120, 121, 122, 123, 129, 130, 131, 135, 137.) In particular, NLIC willfully concealed that Plaintiffs' contracts with NLIC required commissions to be paid to Linder, Liz/Mar, and/or Joseph Anthony out of Fund and participant moneys. (*Id.* ¶ 121, 10 Ill.Dec. 242, 367 N.E.2d 695.) Furthermore, NLIC assisted Linder in concealing reports from Plaintiffs by agreeing to communicate only with Linder regarding the Fund investments. (*Id.* ¶ 122, 10 Ill.Dec. 242, 367 N.E.2d 695.) Given Plaintiffs' allegations of willful concealment of the contract terms by NLIC, they have sufficiently alleged that the mistake was not a result of the Plaintiffs' lack of due care.

\*9 Third, Plaintiffs have sufficiently pleaded that each party can be put in its *status quo ante*. Defendants argue that the money that Plaintiffs seek to recover is in Linder's hands and because Linder is not a party in this case, the parties cannot be restored to their original positions. The Court finds the Defendants' reliance on *Brzozowski v. Northern Trust Co.*, 248 Ill.App.3d 95, 187 Ill.Dec. 814, 618 N.E.2d 405, 409-10 (Ill.App.Ct.1993), is misplaced. In *Brzozowski*, where the plaintiff guarantor sought rescission of a guaranty agreement by which plaintiff guaranteed the indebtedness of Nicholas Ahrens to defendant. *Id.* at 407. The appellate court affirmed the trial court's ruling that rescission was improper in part because defendant could not be put in its *status quo ante* because defendant could not get the loaned money back from Ahrens, which is why it enforced the guaranty. *Id.*

*Brzozowski* is distinguishable from the instant case. First, the plaintiff in *Brzozowski* was denied rescission after a bench trial whereas the instant case is merely at the motion to dismiss stage. Second, Plaintiffs allege that NLIC paid the commissions and fees to Linder after deducting the money from the Funds' assets. (Compl.¶¶ 13, 14, 108). In essence, Plaintiffs allege that NLIC had the Funds' money but then gave it to Linder in the form of fees, kickbacks, and commissions. Accordingly, as alleged, it is possible that each party may be put in the *status quo ante*. Therefore, the Court denies Defendants' motion to dismiss as to Counts III-V.

#### IV. Motion to Stay

With regard to the issuance of a stay, "a district court possesses substantial discretion to control its docket." *Employers Ins. of Wausau v. Shell Oil Co.*, 820 F.2d 898, 902 (7th Cir.1987). "[T]he granting of a stay is the exception, not the rule, and the party seeking the stay has the burden of demonstrating it is necessary." *RLJCS Enters., Inc. v. Prof'l Benefit Trust, Inc.*, No. 03 C 6080, 2004 WL 2033067, at \*2 (N.D.Ill. Sept.2, 2004).

"While the Court has the inherent power to stay its proceedings, the Constitution does not require a stay of civil proceedings pending the outcome of criminal proceedings." *Jones v. City of Indianapolis*, 216 F.R.D. 440, 450 (S.D.Ind.2003). A court may consider the following factors in determining whether to stay civil proceedings where a similar criminal action is brought before the completion of the civil proceedings:

(1) whether the two actions involve the same subject matter; (2) whether the two actions are brought by the government; (3) the posture of the criminal proceeding; (4) the effect on the public interests at stake if a stay were to be issued; (5) the interest of the plaintiffs in proceeding expeditiously with this litigation and the potential prejudice to plaintiffs of a delay; and (6) the burden that any particular aspect of the proceedings may impose on defendants.

*Cruz v. County of DuPage*, No. 96 C 7170, 1997 WL 370194, at \*2 (N.D.Ill. June 27, 1997).

\*10 Defendants do not supply, and the Court does not find, any authority addressing the precise situation in the instant case, *i.e.*, where parties in a civil proceeding, who are not facing criminal prosecution, seek a stay because individuals who are not parties to the civil proceeding may assert their Fifth Amendment right against self-incrimination in pending criminal proceedings against those individuals. Instead, Defendants primarily rely on the six factors discussed in *Cruz v. County of DuPage*, 1997 WL 370194, at \*2.



In *Cruz*, the issue was whether the court should stay the civil proceedings to avoid placing the defendants in the civil case, who had been indicted for conduct arising from the same circumstances that led to civil suits against them, in the position of having to choose between risking a loss in the civil proceedings by invoking their Fifth Amendment rights or risking conviction in their criminal cases by waiving their Fifth Amendment rights and testifying in the civil proceedings. *Id.* at \*3-4.

However, *Cruz* is distinguishable for two reasons. In the present case, Defendants who are seeking a stay have not been indicted and there is no indication that they will be indicted. Rather the indictments are against three non-parties to this case, Linder, Thomas Kisting, and Fred Schreier. Moreover, each of the Defendants is a corporation and "a corporation has no Fifth Amendment privilege," *see Braswell v. United States*, 487 U.S. 99, 105, 108 S.Ct. 2284, 101 L.Ed.2d 98 (1998). Out of an abundance of caution, however, the Court will nevertheless consider the general guidelines to determine whether a stay is warranted. The Court addresses each factor in turn.

A. Whether the Two Actions Involve the Same Subject Matter

Although there are some common allegations between the criminal indictment and Plaintiffs' Complaint, there is not a sufficient overlap of issues to support an entry of a stay in the instant case. The current indictments of Linder, Kisting and Schreier concern specific conduct involving one-time gifts of motorcycles that Linder allegedly gave to Kisting and Schreier. On the other hand, the present case involves an alleged pattern of ongoing conduct in which Defendants paid Linder at least \$1.5 million from 1997 to 2001. (Compl. ¶¶ 101-12.) Therefore, this factor weighs against granting a stay.

B. Whether the Actions Are Brought by the Government

Defendants concede that this factor does not weigh in favor of a stay because the government is not a party to the instant case. As such, there is no danger that the government may use civil discovery to obtain evidence and information for use in its criminal prosecution, thereby circumventing the Fifth Amendment right against self-incrimination. *See Cruz*, 1997 WL 370194, at \*3. Therefore, this factor weighs against the issuance of a stay.

C. The Posture of the Criminal Proceeding

Defendants state that courts generally require that an indictment be issued before granting a stay. *United States v. All Meat & Poultry Prods.*, No. 02 C 5145, 2003 WL 22284318, at \*2 (N.D.Ill. Oct. 3, 2003). However, in *All Meat & Poultry*, the criminal indictments were against the civil defendants themselves. *Id.* at \*1. On the other hand, in the present case, as stated above, Defendants have not been indicted, and there is no indication that they will be. Although the criminal proceedings are ongoing against Linder, Kisting, and Schreier, who are not parties to the civil proceedings, that fact still does not weigh in favor of a stay.

D. The Effect on the Public Interests at Stake If a Stay Was to Be Issued

\*11 Defendants have not articulated how the public interest would be served by granting a stay. Defendants state that Linder, Joseph/Anthony and Liz/Mar no longer serve as third-party administrators for Plaintiffs and there is no threat that they could "engage in continuing wrong." *Cruz*, 1997 WL 370194, at \*3. That may be true, but Defendants have not argued why this fact weighs in favor of a stay. Furthermore, Defendants opine that the stay would allow the Departments of Labor and Justice to proceed without interference by civil litigants. However, Defendants have not given any indication how the present case interferes with the government's case against Linder. Accordingly, this factor does not weigh in favor of a stay.

E. The Interest of Plaintiffs in Proceeding Expeditiously with this Litigation and the Potential Prejudice to Plaintiffs of the Delay

Defendants have not demonstrated that Plaintiffs do not have an interest in prompt litigation of its claims or would not be prejudiced by the delay. Defendants argue that Plaintiffs have not pursued their claims with urgency. On the other hand, as Plaintiffs have correctly pointed out, they have brought their claims within the statutory period. Accordingly, the Court does not find Defendants' argument persuasive in establishing that Plaintiffs will not be prejudiced by a delay.

Defendants also argue that the fact that the 218(D) Fund, a separate and distinct fund from the 218 (S) Plaintiff Fund, agreed to stay its arbitration claim against Linder weighs in favor of staying the present case. The Court does not find this fact relevant to the current inquiry because the 218(D) Fund is not a party to this case. Furthermore, counsel for the 218(D) Fund agreed to stay the arbitration with Linder, Joseph/Anthony, and Liz/Mar in exchange for assurances from Linder's counsel. Specifically, Linder Joseph/Anthony, and Liz/Mar agreed to assign to the 218(S) Fund any amounts that Defendants owed to Linder Joseph/Anthony, and Liz/Mar related to work involving the 218(S) Fund. In contrast, no such assurances have been made in the present case. Therefore, this factor weighs against granting a stay.

F. The burden that any particular aspect of the proceedings may impose on Defendants Defendants have not established that they will be burdened in the absence of a stay. Defendants argue that the potential impact of the criminal proceedings on the ability of the defendants to conduct discovery and defend themselves weighs in favor of a stay. Defendants further speculate that Linder and Kisting will certainly assert their Fifth Amendment rights to avoid complying with discovery requests.

Defendants rely on *Bruner Corp. v. Balogh*, 819 F.Supp. 811, 816 (E.D.Wis.1993), and *United States v. All Meat & Poultry Prods.*, 2003 WL 22284318, at \*2, for the proposition that a civil action should be stayed where a civil defendant would not be able to conduct essential discovery because other parties had invoked their Fifth Amendment rights. In these cases, however, the civil defendant was seeking a stay because other civil defendants were invoking their Fifth Amendment rights, as opposed to the present case in which Defendants seek the stay because a non-party, Linder, may invoke his Fifth Amendment right. Therefore, the Court does not find Defendants' reasoning persuasive.

\*12 Furthermore, mere speculation as to whether Linder and Kisting will invoke their Fifth Amendment rights in the present case is not a sufficient basis for the issuance of a stay. In this vein, the Court has considered whether Defendants could eventually be burdened by an adverse inference against them if non-parties, Linder and Kisting, invoke their Fifth Amendment rights as witnesses in this case. In order to impute a third-party's Fifth Amendment invocation to another party, the party seeking to use the invocation must establish some relationship of loyalty between the other two parties. *State Farm Mut. Auto. Ins. Co. v. Abrams*, No. 96 C 6365, 2000 WL 574466, at \*6 (N.D.Ill. May 11, 2000) (citing *LiButti v. United States*, 107 F.3d 110, 122 (2d Cir.1997)). At this point, it is far too speculative to determine whether Plaintiffs could establish loyalty between Linder and/or Kisting and Defendants such that Linder and/or Kisting's invocation of the Fifth Amendment in this case would lead to an inference against Defendants. Furthermore, it is sheer speculation as to whether Linder or Kisting would ever waive his Fifth Amendment right in this case, even after his criminal proceeding has concluded. Thus, it is possible that even if the Court were to issue a stay in this case, the Court would have needlessly delayed this action waiting for testimony that may never be given. Accordingly, the potential of a possible burden on the Defendants is much too speculative at this point and does not weigh in favor of a stay.

Having considered the parties' arguments and the six general guidelines set forth in *Cruz*, the Court holds that Defendants have failed to satisfy their burden of demonstrating that a stay is necessary in this case. The Court thus denies the motion for a stay.

#### CONCLUSION

For the foregoing reasons, the Court: (1) grants Nationwide Life Insurance Co., Nationwide Financial Services, Inc., Nationwide Trust Co., and Nationwide Financial Institution Distributors Agency, Inc.'s motion to dismiss as to Count II; (2) denies the motion to dismiss as to Counts I, III, IV, and V; and denies the motion to stay the case [doc. nos. 16-1, 16-2].

SO ORDERED

N.D.Ill.,2005.

Board of Trustees of Ironworkers Local No. 498 Pension Fund v. Nationwide Life Ins. Co.  
Not Reported in F.Supp.2d, 2005 WL 711977 (N.D.Ill.), RICO Bus.Disp.Guide 10,861

#### Motions, Pleadings and Filings ([Back to top](#))

- [2004 WL 2816377](#) (Trial Motion, Memorandum and Affidavit) Defendants' Reply in Support of Their Motion to Dismiss and Motion to Stay (Oct. 6, 2004)
- [2004 WL 2816370](#) (Trial Motion, Memorandum and Affidavit) Plaintiffs' Memorandum in Opposition to Defendants' Motions to Dismiss and to Stay (Sep. 20, 2004)
- [2004 WL 2816363](#) (Trial Pleading) Complaint (Feb. 2, 2004)[Original Image of this Document \(PDF\)](#)

- [1:04cv00821](#) (Docket) (Feb. 02, 2004)

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EXHIBIT NO. 25

4/11/91 N.Y.L.J. 1, (col. 1)

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Outside Counsel

## 'SCHWIMMER' EXPANDS LIABILITY FOR UNION PENSION FUND ADVISORS

J. Bruce Maffeo [FNa]

IN A RECENT sleeper of a decision whose repercussions have yet to be felt, the U.S. Court of Appeals for the Second Circuit dramatically expanded the scope of potential criminal liability for investment advisers and others who provide financial services to employee benefit plans, including, most notably, union pension funds.

In a case of first impression, the Second Circuit in *United States v. Schwimmer* [FN1] held that 18 U.S.C. §1954, the federal criminal statute prohibiting illegal payments to influence the operation of employee benefit plans, requires full disclosure of all payments, including outside commissions, received by parties as a result of their investing plan funds. Moreover, Schwimmer capped a series of decisions in this circuit and elsewhere extending §1954's reach to virtually everyone who provides advice or services affecting plan matters.

To fully appreciate the significance of these holdings, some brief background is necessary. After a six week trial conducted in 1988 before then U.S. District Judge Joseph M. McLaughlin in the Eastern District of New York, a jury convicted Martin Schwimmer of a single count of conspiracy to violate RICO -- the Racketeer Influenced and Corrupt Organization Act [FN2], 76 counts of violating 18 U.S.C. §1954, and miscellaneous counts of tax evasion.

The thrust of the government's case was that Mr. Schwimmer, an investment adviser to the benefit plans of two New York labor unions, had conspired with a Long Island money broker to conceal some \$16 million in commissions that they had received as a result of investing plan funds. [FN3] According to testimony at trial, Mr. Schwimmer and his co-conspirators invested the money in long-term certificates of deposit issued by small banks and S&Ls and then diverted the resulting commissions to a series of hidden bank accounts. Mr. Schwimmer failed to report the receipt of his share of the money to either the IRS or the unions.

Mr. Schwimmer's obligations to the IRS to one side, his duty to inform the unions of his commissions emerged as a central issue at trial, and later on in the appeal. [FN4] Since 1971, Mr. Schwimmer had served as a regular investment adviser to the employee benefit plans of one union, Local 38 of the Sheetmetal Workers International Association.

Pursuant to a formal arrangement with the Local, Mr. Schwimmer was paid an hourly fee for his services and given complete authority to invest the plans' combined portfolios subject only to general guidelines. Local 38 officials testified at trial that Mr. Schwimmer not only failed to disclose his receipt of commissions but denied having done so in response to a direct inquiry.

By contrast, Mr. Schwimmer's relationship to the benefit plans of the second union, Local 810 of the International Brotherhood of Teamsters, was far from clear. No formal agreement existed between him and Local 810 with respect to his services, although testimony at trial showed that over a five year period the union's benefit plans invested \$75 million, half of their total assets, in certificates of deposit as a result of Mr. Schwimmer's advice. These facts notwithstanding, Local 810's comptroller testified that he considered Mr. Schwimmer only a "broker" whom he "assumed," but did not question at the time, was paid from other sources.

The murky nature of Mr. Schwimmer's relationship to Local 810 came into focus at the close of the government's case when he moved for a judgement of acquittal as to those counts of the indictment involving that union, arguing that the government had failed to prove that he fit within any of the categories of individuals regulated by §1954.

According to the statute, those categories include, among others, any "administrator, officer, trustee,

custodian, counsel, agent, or employee" of any employee benefit plan as well as any person who "provides benefit plan services to such plan." [FN5] In turn, individuals falling into any of the statutory categories are prohibited from receiving "any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter concerning such plan." [FN6]

#### §1954 Applies

In two written opinions issued after the jury's verdict, Judge McLaughlin disagreed with the defense position, holding instead that §1954's "broad language ... encompasses almost every conceivable person who could deal with or administer a benefit plan." [FN7] Indeed, Judge McLaughlin wrote, the statute's legislative history made it clear that §1954 "applies to, among others, investment brokers who provide services to an employer benefit plan." [FN8] Accordingly, Judge McLaughlin found that the trial evidence amply supported the jury's conclusion that Mr. Schwimmer fell within §1954's reach. [FN9]

Having counted Mr. Schwimmer among the class of individuals whose conduct is regulated by §1954, Judge McLaughlin separately considered whether his concealment of the commissions he had earned from investing union funds violated the statute. That issue had been raised by the jury in a series of notes requesting clarification of §1954's provision exempting from the definition of prohibited payments the acceptance of "bona fide salary, compensation, or other payments made for goods or facilities actually furnished or for services actually performed in the regular course of ... duties." [FN10]

Judge McLaughlin's original jury charge had defined "bona fide" as simply meaning "in good faith or without deceit or fraud." [FN11] Finding that definition inadequate, the jury subsequently asked "(i)f the defendant were charging a very high commission but the union knew the amount, would that be bona fide?" [FN12]

The answer to the jury's question, Judge McLaughlin wrote, was yes, as long as the union knew what the commission was:

"After reviewing the legislative history, the sparse case law, and the statute itself, I find that the only reasonable construction of bona fide is to require disclosure. In order for beneficiaries to decide whether compensation to a fiduciary who handles the investment of union funds is bona fide, the beneficiaries must be told what the compensation is. It would be wholly inconsistent with the Act if a fiduciary could determine for himself what bona fide compensation should amount to. This decision must be left to the plan beneficiaries." [FN13]

#### Protect Beneficiaries

In affirming Mr. Schwimmer's conviction, the Second Circuit, in an opinion written by Justice Roger J. Miner, upheld Judge McLaughlin's reading of §1954 in both respects. First, the court agreed that for liability to attach under the statute, a defendant need not hold a specific position but rather only "exercise control, direct or indirect, authorized or unauthorized over [a plan.]" [FN14]

The breadth of this holding was consistent with a series of prior decisions by the Second and Third Circuits construing §1954 to include anyone, regardless of position, who has the capacity to influence an employee benefit plan. [FN15] Indeed, courts have applied a similarly expansive reading to other provisions of the statute as well, affirming, for example, the convictions under §1954 of union officials who received television sets issued as complementary gifts by a bank where union pension funds were deposited. [FN16] Schwimmer expressly adopted the reasoning of this line of cases, noting that "section 1954 uses broad language to protect plan beneficiaries from dishonest or unfaithful fiduciaries." [FN17]

As to the definition of the term bona fide, the circuit court also agreed with Judge McLaughlin that the phrase necessarily contained an element of good faith that required full disclosure of all payments, including commissions. Any contrary interpretation, the court wrote, "weakens the force of the statute through which Congress intended to regulate strictly the administration and operation of employee benefit plans." [FN18]

Thus, in the wake of Schwimmer, it is clear that pension fund advisers operating within the Second Circuit at least will be held to an affirmative duty to disclose the full terms of the profits and costs of the services they provide. Failure to do so will run the risk of prosecution not only under §1954 but also RICO, which numbers the statute as one of its predicate acts. Given these grievous

consequences, individuals and institutions involved in this area are well advised to revisit the extent of the disclosures, if any, that they have made to the benefit plans they service.

FN1 J. Bruce Maffeo, a criminal defense attorney in Manhattan, tried the Schwimmer case while a member of the Justice Department's Organized Crime Strike Force in Brooklyn.

FN1 924 F.2d 443 (2d Cir. 1991). This opinion was submitted after an earlier decision by the same panel had remanded the case to the district court for an evidentiary hearing into the defense claim that the government had violated Mr. Schwimmer's attorney-client privilege through its contact with an accountant jointly retained by Mr. Schwimmer and a former co-defendant. See United States v. Schwimmer, 892 F.2d 237 (2d Cir. 1989). The circuit court ultimately upheld the district court's finding that no violation of the privilege had occurred. Schwimmer, 924 F.2d at 445. Yet a third circuit court opinion involving Schwimmer upheld the government's right to compel Mr. Schwimmer's testimony before a grand jury while his direct appeal from the conviction was pending. See United States v. Schwimmer, 882 F.2d 22 (2d Cir. 1989).

FN2 18 U.S.C. §§1962(c) and (d) (1982).

FN3 The money broker, Mario Renda, was president of First United Fund Ltd., for years one of the nation's largest investors in long-term certificates of deposit. Mr. Renda originally was indicted with Mr. Schwimmer and later pleaded guilty to racketeering and tax charges after agreeing to cooperate with the government. For an excellent discussion of Mr. Renda's role in this case as well as his widely publicized part in a number of S&L failures, see S. Pizzo & P. Muolo, *Inside Job: The Looting of America's Savings and Loans*, (McGraw Hill 1989).

FN4 Mr. Schwimmer was vigorously represented at trial and during the preceding grand jury investigation by Robert S. Fink and Kathryn Keneally of Kostelanetz and Ritholz. He is represented on appeal by Nathan and Alan Dershowitz.

FN5 18 U.S.C. §1954.

FN6 *Id.*

FN7 United States v. Schwimmer, 700 F.Supp. 104, 106 (E.D.N.Y. 1988).

FN8 United States v. Schwimmer, 706 F.Supp.6,8 (E.D.N.Y. 1989).

FN9 Schwimmer, 706 F.Supp. at 8.

FN10 18 U.S.C. §1954.

FN11 Schwimmer, 700 F.Supp. at 105, n.3.

FN12 *Id.*, n.2.

FN13 *Id.*, at 107 (emphasis in original). Ironically under this analysis, Judge McLaughlin went on to emphasize the size of the commission was irrelevant, noting that "as long as there is full disclosure, the union is able to make its own contracts, agreements, or understandings." *Id.*

FN14 Schwimmer, 924 F.2d at 447, quoting United States v. Robilotto, 828 F.2d 940, 946 (2d Cir. 1987), cert. denied 484 U.S. 1011 (1988).

FN15 See United States v. Robilotto, *supra*, and cases cited.

FN16 See United States v. Romano, 684 F.2d 1057 (2d Cir.), cert. denied, 459 U.S. 1016 (1982).

FN17 Schwimmer, 924 F.2d at 448.

FN18 Id.  
4/11/91 NYLJ 1, (col. 1)  
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EXHIBIT NO. 26

San Diego Municipal Employees Association  
Board of Directors  
Minutes  
August 13, 1997

I. CALL TO ORDER

The meeting was called to order at 12:21 P.M.

II. OFFICERS: Judie Italiano/President, Jim Baross/First Vice President, John Torres/Second Vice President, Tim Owens/Treasurer, Bill Nery/Secretary

Members: Nader Abuljebain, John Bahl, Juan Baligad, John Benedetto, Joan Lundy-Boyd, Mike Brandt, Ron Brown, Carl Brummund, Lisa Burkhart, Mary Bush, Tonia Carnell, John Casey, Richard Cortopassi, Leroy Cunningham, David Estey, Sandra "Jean" Evans, Maria Fresquez, Lawrence Hamilton, Linda Hanley, Susan Infantino, Chun Chi Ma, Mary Marino, Steve Meyer, John Mulvey, Melody Negrete, Cindy Noblit, Jeffrey Peterson, Rich Russell, Jackie Salzwedel, Robert Sherer, John Swanson, Barbara Thompson, Bill Tripp, Dorian Wicks

Absent: Rhonda Collins, Sherrill Dalrymple, Layton Galloway, John MacDonald, Tracy Reed, Catherine Rufing (excused), Al Smith, Calvin Tani, Ervin Ray Wallace (excused), Greg Woods (excused)

Guest: Kyle Wiggins

III. ANNOUNCEMENTS

Judie announced that the Board of Directors Installation will be on September 10th at 12:30 P.M. at the Embassy Suites Hotel. Guest speakers will include Penny Culbreth-Graft, Acting City Manager and Karen Keeslar, Executive Director of CIPELC.

Judie thanked the Board members who helped gather information on people who have been terminating their membership. She asked the Board members who have not yet contacted theirs to please do so and get any information back to her.

Judie announced that Ann Smith will be speaking today on Local 127's Lawsuit. Local 127 has filed a lawsuit against the City regarding the Competition Program. Judie, Dean Rollins, Steve Meyer and Jim Baross all met with Ann to go over what the issues are that Local 127 is filing on and what MEA's ideas are regarding the issues. Ann will be giving an update to the Board and what she thinks about it.

Judie announced that the City will be meeting with Local 127 to try and resolve the problem. The City will also talk with MEA regarding protection of the Competition Program. Judie

needed to be able to give blood.

There was a short question and answer session.

Kelly announced that there are posters available for Board members to post on their bulletin boards that list the dates and locations of the Blood Drive. T-shirts will be given out to everyone who donates. The Chairperson for the Concourse is Susan Infantino and her support staff is Jackie Salzwedel, Jeff Peterson and Juan Baligad. They will assist her in soliciting donors for the Blood Drive which will be happening the same time as the "Nobody Does It Better" Rally. The other Blood Drive Chairpersons are: Police Headquarters, Terri Bauerlein, Alvarado, Tony Ruiz and Ridgehaven, Dorian Wicks and Larry Trame. There will be a competition between us and the County who collected 688 units of blood for their drive this year.

#### V. OLD BUSINESS

Judie opened the nominations for the 6 at large seats on the Executive Committee.

The nominations are: Jackie Salzwedel, Jeff Peterson, Ron Brown, Steve Meyer, Rich Russell, Susan Infantino, John Swanson, and Joan Lundy-Boyd.

MSC 0897.002 Motion to close the nominations - John Casey.  
Second - Nader Abuljebain. Motion Carried.

Each person nominated gave a quick speech on their background and why they wanted to be on the Executive Committee. Ballots were given out for each Board member to nominate 6 new Executive Committee members.

Jim Baross thanked everyone who ran for the Executive Committee at large seats. After the ballots were tallied he announced the new Executive Committee members who are Jeff Peterson, Susan Infantino, Rich Russell, Ron Brown, Steve Meyer and Jackie Salzwedel.

#### VI. REPORTS

##### President's Report - Judie Italiano

Judie announced that Bill Nery will be announcing the Board election outcome. Most everyone will return for another term. Judie announced that Mike Brandt will be resigning and moving out of the City of San Diego. Judie thanked Mike for the 3 terms he spent on the Board of Directors as well as his help in Negotiations regarding Dispatchers.

Judie asked the Board members to find out if they have phone number lists for departmental employees. She would like

The Executive Committee would like to put a memo out that states even though we are having problems with the International Union over Union issues, we support the premise that employees are the most important and as labor workers we support them in getting a fair contract.

There was heavy discussion.

MSC 0897.003 Motion to write the letter to support the UPS employees - audio unclear. Second - Nader Abuljebain. Opposed - Larry Hamilton, Ron Brown, Maria Fresquez. Abstained - Linda Hanley, Juan Baligad and Leroy Cunningham.

## VI. COMMITTEE REPORTS

### Treasurer's Report - Tim Owens

Tim reported that he and the Accountant, Pat Richard, went back through the budget reports from November on. They found some bookkeeping errors and went through each one. Tim has copies of the reports if anyone would like one. Tim gave out copies of the May 1997 monthly report which shows the adjusted income was \$111,000.00. The expenses were \$108,500.00. We had income over expenses of \$2,500.00. Tim reported that 58% of the year has passed and the total adjusted income for the year is \$627,000.00 and the expenses are \$632,000.00 which gives us expenses exceeding income of \$5000.00. We are doing a great job of staying close to our budget.

MSC 0897.004 Motion to approve the Finance report pending audit - Finance Committee. Second - Executive Committee. Motion Carried.

Tim announced that the Finance Committee meetings have moved to the 1st Wednesday of every month at 11:00 AM.

### Secretary's Report - Bill Nery

Bill reported that Casey Gwinn sent a letter to Judie and the Board of Directors to thank the Board for inviting him as a guest speaker. Bill read the letter to the Board.

Bill read the agreement contract made with the Lucia Companies for the staff's retirement plan.

MSC 0897.005 Motion to authorize Judie Italiano and Tim Owens to sign the agreement with the Lucia Companies for the staff's retirement plans on behalf of the Board of Directors - John Casey. Second - Rich Russell. Motion Carried.

MSC 0897.006 Motion to have Judie negotiate a contract with the Lucia Companies for the membership - John Casey. Second - Chun Chi Ma. Motion Carried.

new office is located at 400 B Street. The next Retirement meeting will be September 22nd at 1:30 PM.

VII. MINUTES

MSC 0897.009 Motion to approve the May 14, 1997 Board Minutes - Larry Hamilton. Second - Lisa Burkhart. Motion Carried.

VIII. NEW BUSINESS

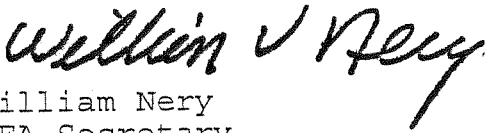
John Casey asked the Board to appoint someone as Chair to negotiate with the City regarding Judie's retirement contributions. They denied Judie the ability to contribute to her City retirement when she became the President of MEA. They have since reversed this decision and John said that he would be happy to be the chair.

MSC 0897.010 Motion to elect John Casey as a Chairperson to negotiate Judie's retirement with the City - John Torres. Second - Bill Tripp. Motion Carried.

IX. ADJOURN

The meeting was adjourned at 4:26 PM.

Respectfully submitted by,

A handwritten signature in black ink, appearing to read "William Nery", written in a cursive style.

William Nery  
MEA Secretary

EXHIBIT NO. 27

**SDCERS' RETIREMENT BOARD MINUTES**  
**FRIDAY, OCTOBER 17, 1997**

The Retirement Board of Administration held its regularly scheduled meeting in the System's Board Room. Location: 401 "B" Street, Suite 400, San Diego, CA 92101. The meeting was called to order at 1:35 p.m. by Keith Enerson.

**IN ATTENDANCE:**

Trustees: Keith Enerson, Chair; Ron Saathoff, Jack Katz, John Casey, Paul Barnett, Terri Webster, Robert Scannell, John Torres, Diann Shipione

Staff: Lawrence Grissom, Lori Chapin, Christine Folsom, Roxanne Parks, Sally Zumalt, Cynthia Hilliard, Jan Beaton, Peggy Martinez, Doug McCalla, Patrick Lane, Mercedes Barcelona, Shirley Cunningham, Vincent Hayes

Public: Cathy Lexin, Carol Carr, Matthew MacCawley, Charles Alesi, Harold Mullins, Rebecca Ching, Willie Jones, Peter Kopf, Carol Labonte, James Cunningham, Perry Thompson, Scott O'Mara, Gail Beirman, David Dugan, Lori Cage, Butch Hubble, Judie Italiano

Excused: Sharon Wilkinson, Conny Jamison, Bruce Herring, Frederick Pierce

**I. APPROVAL OF CONSENT AGENDA ITEMS #A - G**

**MOTION TO APPROVE CONSENT AGENDA ITEMS A-G:** J. TORRES  
J. KATZ

**SECOND:**

**DISCUSSION:**

Mr. Saathoff questioned whether the Auditor and Comptroller's report was distributed.

Mr. Grissom responded a series of mechanical problems had occurred which interfered with the System's Investment Accountant being able to perform her job. These problems included changing from trade date accounting to settlement date accounting and the custodial bank not posting transactions in a timely fashion. He stated he hopes these problems will subside once the custodial bank RFP has been completed.

**MOTION AMENDED TO APPROVE CONSENT AGENDA ITEMS #1A, B, C, E, F**  
**AND G:** J. TORRES  
**SECOND:** J. KATZ  
**BOARD:** UNANIMOUS  
**MOTION TO APPROVE PASSED.**

**SERVICE RETIREMENTS**

1. Elinora S. Brown, Customer Service Representative, Water Department. Age 67.25. 18.00 years creditable service. Effective date 10/19/97. Estimated monthly allowance \$1,110.33 plus \$55.24 COLA, maximum benefit. (Additional funds from Surviving Spouse)
2. Donald Hillman, Jr., Assistant Port District Director, UPD. Age 64.50. 31.00 years creditable service. Effective date 10/4/97. Estimated monthly allowance \$8,847.61 plus \$166.67 COLA, maximum benefit with surviving spouse provisions. (ERIP)

**SDCERS' RETIREMENT BOARD MINUTES**  
**FRIDAY, OCTOBER 17, 1997**

4. ELECTION OF OFFICER (VICE-PRESIDENT)
5. COMMITTEE APPOINTMENTS

Mr. Enerson requested Items #4 -5 be continued to the November meeting so a full Board could be present to vote.

**MOTION TO CONTINUE ITEMS #4-5 UNTIL NOVEMBER, 1997:**

SECOND:

BOARD:

MOTION TO CONTINUE ITEMS #4-5 FOR 30-DAYS PASSED.

J. KATZ

J. TORRES

UNANIMOUS

## **VII. BUSINESS AND PROCEDURES COMMITTEE REPORT - RON SAATHOFF**

### **1. INFORMATIONAL**

A. **STATUS REPORTS - NO ACTION REQUESTED**

1. PROPOSAL REGARDING OVERPAYMENT OF SURVIVING SPOUSE BENEFITS - JANET HOLLADAY

Mr. Saathoff indicated a certified letter was sent to Ms. Holladay with her options in regards to paying back her overpayment. Staff has not yet received a response. This item will come back in November.

### **2. OLD BUSINESS**

A. **APPROVAL RECOMMENDED**

1. REQUEST FROM THE CITY MANAGER'S OFFICE RE: CHANGES IN THE DISABILITY PROCESS

Mr. Saathoff stated Staff is working on a draft document which will be available at the November meeting. No action necessary.

**SDCERS' RETIREMENT BOARD MINUTES  
FRIDAY, OCTOBER 17, 1997  
PAGE 12**

### **3. NEW BUSINESS**

A. **APPROVAL RECOMMENDED**

1. REQUEST FOR WAIVER OF INTEREST ON PSC (PURCHASE OF SERVICE CREDIT) BY JUDIE ITALIANO

Mr. Grissom provided background information on this request. He stated that as a result of miscommunications from the Manager's office to Ms. Italiano



regarding her leave-without-pay status while filling the Presidency of MEA, this request comes forth at no fault of Ms. Italiano.

Mr. Saathoff stated the Committee had considered this item and recommends approval of a waiver of interest of \$19,809.50 because Ms. Italiano had been treated differently than presidents of the other labor organizations. Additionally, he said the City Manager's office supports this request.

**MOTION TO APPROVE MS. ITALIANO'S REQUEST TO WAIVE  
INTEREST OF \$19,809.50 ON HER PURCHASE OF SERVICE:**

**SECOND:**  
**BOARD:**  
**MOTION TO APPROVE PASSED.**

**R. SAATHOFF**  
**J. CASEY**  
**UNANIMOUS**

**4. TRAINING**

**A. ACTION REQUESTED**

1. DIANN SHIPIONE, JOHN TORRES AND FRED PIERCE'S  
ATTENDANCE AT CALAPRS BASIC PRINCIPLES OF PENSION  
MANAGEMENT AT STANFORD UNIVERSITY FEBRUARY 11-13, 1998

Mr. Saathoff stated attendance at this training is limited. Therefore, it is the recommendation of the Committee that Ms. Shipione be designated 1st alternate, Mr. Pierce 2nd alternate and Mr. Torres 3rd alternate.

**MOTION TO APPROVE THE COMMITTEE'S RECOMMENDATION:**

**SECOND:**  
**BOARD:**  
**MOTION TO APPROVE PASSED.**

**R. SAATHOFF**  
**J. CASEY**  
**UNANIMOUS**

**VIII. INVESTMENT COMMITTEE REPORT - ROBERT SCANNELL**

**SDCERS' RETIREMENT BOARD MINUTES**  
**FRIDAY, OCTOBER 17, 1997**  
**PAGE 13**

**1. REPORTS**

**A. STATUS REPORT - NO ACTION REQUESTED**

1. MANAGER'S WATCH LIST
2. SDCERS' ASSET ALLOCATION
3. IPC'S QUARTERLY REPORT AS OF JUNE 30, 1997

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# Exhibit 15

EXHIBIT NO. 28

CLOSED SESSION REPORT ☒ CITY OF SAN DIEGO ☐ OTHER (See below)TITLE Labor negotiations - meet and confer  
labor negotiations DCAs Rivo/MarshallDATE OF CLOSED SESSION: 4/30, 2002☐ REAL PROPERTY NEGOTIATIONS G.C. § 54956.8☐ Ongoing/Status Report☐ Final Approval of Agreement (D)

Substance of Agreement: \_\_\_\_\_

☐ Final approval dependent on other party☐ LITIGATION G.C. § 54956.9☐ (a) Pending ☐ (b)(1) Significant Exposure ☐ (b)(2) Authorizing Session ☐ (c) Initiating☐ Defend Litigation (D)☐ Status Report☐ Seek Appellate Review (D)☐ Refrain from Seeking Appellate Review (D)☐ Amicus Participation☐ Other (see below)☐ Settlement Offer To Be Conveyed☐ Acceptance of Signed Settlement Offer (D)☐ Initiate Litigation or Intervene (D)☐ Contingent Acceptance of Signed Offer☐ Non-Disclosure of Litigation Recommended (check if yes): ☐ See Report☐ Interfere with service of process ☐ Impair ability to settle

Date Litigation Concluded: \_\_\_\_\_, 2002

By: \_\_\_\_\_

Title: \_\_\_\_\_

(TYPE NAME)

☐ CLAIMS DISPOSITION G.C. § 54956.95☐ Offer Made☐ Offer Accepted☐ See Report☐ DECISION ON EMPLOYMENT STATUS G.C. § 54957☐ Appoint (D)☐ Employ (D)☐ Accept Resignation (D)☐ Discipline (D)☐ Dismissal or Nonrenewal (disclose after exhaustion of administrative remedies) ☐ Performance Evaluation

Title: \_\_\_\_\_

Change in Compensation: \_\_\_\_\_

## ATTENDEES:

☒ City Mgr ☒ Asst City Mgr ☒ Sr Dep City Mgr (Loveland)☒ City Atty ☒ Exec Asst City Atty ☒ Asst City Atty (Girard)☒ City Auditor☒ Other Bruce Herring, Pat Frazier, Dan Kelley, Stan Griffith,☒ LABOR NEGOTIATIONS G.C. § 54957.6☒ Ongoing/Status Report☐ Final Approval of Agreement (D) Other Party to Negotiation: \_\_\_\_\_

Item Approved: \_\_\_\_\_

☐ PUBLIC SECURITY THREAT G.C. § 54957Terri Webster, Rich Snapper, Elmer Heap, Mike Rivo,Cathy Lexin, Mike McGhee, Sharon Marshall☐ VOTE☒ NO VOTE NECESSARY

COMMENTS: \_\_\_\_\_

Name	Yea	No	Absent
District 1			
District 2			
District 3			
District 4			
District 5			
District 6			
District 7			
District 8			
Mayor			
Voting Tally			

APPROVED: \_\_\_\_\_

NOTE: (D) DISCLOSE FOLLOWING CLOSED SESSION

EXHIBIT # 56

Meet & Confer 4/30

Presidential leave

A) MEA & BA only -

Ap. recommendation - base retirement at  
high 1 yr. union salary.

9-0-0

B) Prospective union pres. -  
Trail 1 wk.

C) 145 -

Trail 1 wk.

# City of San Diego

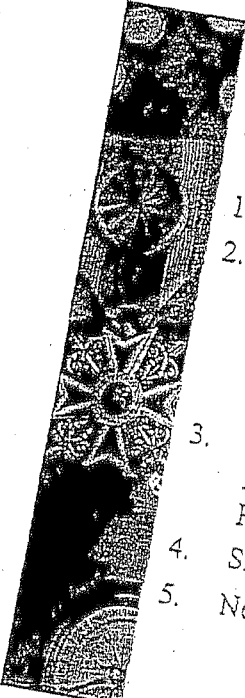
## Meet & Confer 2002

### Closed Session

April 29, 2002

1

## Meet & Confer 2002 Agenda

- 
1. Status of Negotiations (Information)
  2. Management Team Recommendations (Action)
    - Special Salary Adjustments
    - Other/Miscellaneous Items
    - Retirement Issues
  3. Civil Service Commission Recommendations: (Information)
  4. Report back on three Classes (Information)
  5. SB 402 - Binding Arbitration (Information)
  - Next Steps (Information)

2



## Meet & Confer 2002

### Union Presidential Leave & Retirement Benefits Current Status of Union Presidents

Union	President	Status
POA	Bill Farrar	Full-time Union president Unpaid Leave from City.
Local 145	Ron Saathoff	Full-time employee. Release time for Union activities.
MEA	Judie Italiano	Full-time Union president. Unpaid Leave from City.
Local 127	Tony Padilla	Full-time employee. Release time for Union activities.

47

## Meet & Confer 2002

Union/President	Employment Status	Retirement Issue
MEA Judie Italiano	- Leave of Absence 14 years - Payroll Specialist - Full-time MEA President & General Manager	- Purchased past service - Contributes to Retirement on Union Salary (\$102,128) - Retirement formula = high one year on union salary *
POA Bill Farrar	- Leave of Absence 2 years - Police Officer II - Full time POA President	- All Service Paid - Contributes to Retirement on union salary (\$82,300) - Retirement formula = high one year on union salary *

\* Approximate un-funded Liability      Judie Italiano      \$145,000  
Bill Farrar      \$56,000

48



## Meet & Confer 2002

### Union Presidential Leave & Retirement Benefits Issue 1 – Current Union Presidents

#### Management Team Recommendation:

- Authorize inclusion of union salary in high one-year calculation; establish a maximum retirement high one-year salary at level equal to City Labor Relations Manager (approx. \$108k)

49



## Meet & Confer 2002

### Union Presidential Leave & Retirement Benefits Issue 2: Prospective Union Presidents

#### Management Team Recommendations:

- City to allow each union to have a full-time City-paid union President
- Union President/employee to be paid for normal work period at current level and receive current benefits with no overtime
- Union President to be entitle to retirement benefits consistent with his/her classification and level of compensation
- Union may compensate the union president for services to the union outside the normal work period. Such compensation shall not affect or be a part of City compensation, nor affect or add to retirement benefits
- Subject to final review and clearance by City Attorney

Estimated Cost: \$170,000 annually for two active presidents

50



## Meet & Confer 2002

### Union Presidential Leave & Retirement Benefits Issue 3 – Requested Presidential Leave for Local 145

Union/President	Employment Status	Retirement Issue
Local 145 Ron Saathoff	- Full-time City employee - Fire Captain	- Use City salary and union salary for high one year calculation (approx. \$80k + \$40k = \$120k) - No retirement contribution made on union salary*

\*Approximate Unfunded Liability      \$100,000

51

## Meet & Confer 2002

### Union Presidential Leave & Retirement Benefits Issue 3 – Requested Presidential Leave for Local 145 Management Team Recommendation:

\*Treat current President under Issue 2; do not  
authorize inclusion of union salary in high one-  
year calculation.

#### Alternative:

Treat current President under Issue 1, combine  
City salary and Union salary; cap retirement high  
one-year salary at level equal to City Labor  
Relations Manager (approx. \$108k)

52

EXHIBIT NO. 29

PROMISSORY NOTE



I, Judie Italiano promise to pay the San Diego Municipal Employees Association the full amount of my accumulated payables.

I understand that I am liable for this debt regardless of my employment status with the San Diego Municipal Employees Association and agree to pay in full the amount should I terminate my employment prior to paying this debt in full

I agree to repay this at the rate of \$500.00 per pay period until the full balance of my payables has been paid.

If I fail in my responsibility to pay this debt, I hereby grant the San Diego Municipal Employees Association a lien against my MEA sponsored retirement for the balance due.

Judith M Italiano  
Signature

JUDITH M. ITALIANO  
Print Name

[REDACTED]  
Social Security Number

12/12/04  
Date

[Signature]  
Witness SDMEA

7/12/04  
Date

4185 Home Avenue  
San Diego, CA 92105  
P: 619.264.6632  
F: 619.264.0405  
W: www.sdmea.org

EXHIBIT NO. 30

**ASSIGNMENT OF DEPOSIT ACCOUNT (5 Page Document)**

Principal	Loan Date	Maturity	Loan No.	Account	Officer
\$50,000.00	8-01-2002	07-29-2006	redacted	redacted	redacted

Borrower: Integrated Labor Solutions Inc.

Grantor: San Diego Municipal Employees Association

4185 Home Ave

San Diego, CA 92105

Lender: California Bank & Trust El Cajon 1024 Graves Avenue

El Cajon, CA 92021

1140 W. Palm

San Diego, CA 92103-6000

Time Deposit Summary 3/29/06

Certificate Deposit Account

Balance \$50,000 7-29-06

Total: 58,114

Original Document Withheld

Principal	Loan Date	Maturity	Loan No.	Call Coll.	Account	Officer	Initials
0:000.00	08-01-2002	07-29-2006					

Differences in the shaded area are for Lender's use only and do not limit the applicability of this document to any particular loan or item. Any item above containing [redacted] has been omitted due to text length limitations.

**Borrower:** Integrated Labor Solutions, Inc.  
1140 W. Palm  
San Diego, CA 92103-8000

**Lender:** California Bank & Trust  
El Cajon  
1024 Graves Avenue  
El Cajon, CA 92021

**Grantor:** San Diego Municipal Employees Association  
4185 Home Ave  
San Diego, CA 92105

**ASSIGNMENT OF DEPOSIT ACCOUNT** dated August 1, 2002, is made and executed among San Diego Municipal Employees Association ("Grantor"); Integrated Labor Solutions, Inc. ("Borrower"); and California Bank & Trust ("Lender").

**SIGNMENT.** For valuable consideration, Grantor assigns and grants to Lender a security interest in the Collateral, including without limitation the deposit accounts described below, to secure the indebtedness and agrees that Lender shall have the rights stated in this Agreement with respect to the collateral, in addition to all other rights which Lender may have by law.

**COLLATERAL DESCRIPTION.** The word "Collateral" means the following described deposit account ("Account"):

CD Account Number 2020005513 with Lender with an approximate balance of \$50,000.00.

together with (A) all interest, whether now accrued or hereafter accruing; (B) all additional deposits hereafter made to the Account; (C) any and all proceeds from the Account; and (D) all renewals, replacements and substitutions for any of the foregoing.

**COSS-COLLATERALIZATION.** In addition to the Note, this Agreement secures all obligations, debts and liabilities, plus interest thereon, of Borrower or any one or more of them, as well as all claims by Lender against Borrower or any one or more of them, whether now existing or hereafter arising, whether related or unrelated to the purpose of the Note, whether voluntary or otherwise, whether due or not due, direct or indirect, determined or undetermined, absolute or contingent, liquidated or unliquidated, whether Borrower or Grantor may be liable individually or jointly with others, whether obligated as guarantor, surety, accommodation party or otherwise, and whether recovery upon such amounts may be or hereafter may be barred by any statute of limitations, and whether the obligation to repay such amounts may be or hereafter may become otherwise enforceable.

**BORROWER'S WAIVERS AND RESPONSIBILITIES.** Except as otherwise required under this Agreement or by applicable law, (A) Borrower agrees to indemnify Lender, need not tell Borrower about any action or inaction Lender takes in connection with this Agreement; (B) Borrower assumes the responsibility for being and keeping informed about the Collateral; and (C) Borrower waives any defenses that may arise because of any action or inaction of Lender, including without limitation any failure of Lender to realize upon the Collateral or any delay by Lender in realizing upon the Collateral; (D) Borrower agrees to remain liable under the Note no matter what action Lender takes or fails to take under this Agreement.

**GRANTOR'S REPRESENTATIONS AND WARRANTIES.** Grantor warrants that: (A) this Agreement is executed at Borrower's request and not at the request of Lender; (B) Grantor has the full right, power and authority to enter into this Agreement and to pledge the Collateral to Lender; (C) Grantor has established adequate means of obtaining from Borrower on a continuing basis information about Borrower's financial condition; and (D) Lender has made no representation to Grantor about Borrower or Borrower's creditworthiness.

**GRANTOR'S WAIVERS.** Except as prohibited by applicable law, Grantor waives any right to require Lender to (A) make any presentment, protest, demand, or notice of any kind, including notice of change of any terms of repayment of the indebtedness, default by Borrower or any other guarantor or surety, any action or nonaction taken by Borrower, Lender or any other guarantor or surety of Borrower, or the creation of new or additional indebtedness; (B) proceed against any person, including Borrower, before proceeding against Grantor; (C) proceed against any collateral for the indebtedness, including Borrower's collateral, before proceeding against Grantor; (D) apply any payments or proceeds received against the indebtedness in any order; (E) give notice of the terms, time, and place of any sale of any collateral pursuant to the Uniform Commercial Code or any other law governing such sale; (F) disclose any information about the indebtedness, the Borrower, any collateral, or any other guarantor or surety, or about any action or nonaction of Lender; or (G) pursue any remedy or course of action in Lender's power whatsoever.

Grantor also waives any and all rights or defenses arising by reason of (A) any disability or other defense of Borrower, any other guarantor or surety or any other person; (B) the cessation from any cause whatsoever, other than payment in full, of the indebtedness; (C) the application of proceeds of a indebtedness by Borrower for purposes other than the purposes understood and intended by Grantor and Lender; (D) any act of omission or commission by Lender which directly or indirectly results in or contributes to the discharge of Borrower or any other guarantor or surety, or the indebtedness, or the loss or release of any collateral by operation of law or otherwise; (E) any statute of limitations in any action under this Agreement on the indebtedness; or (F) any modification or change in terms of the indebtedness, whatsoever, including without limitation the renewal, extension, acceleration, or other change in the time payment of the indebtedness is due and any change in the interest rate.

Grantor waives all rights and defenses arising out of an election of remedies by Lender even though that election of remedies, such as a non-judicial foreclosure with respect to security for a guaranteed obligation, has destroyed Grantor's rights of subrogation and reimbursement against Borrower by operation of Section 580d of the California Code of Civil Procedure or otherwise.

Grantor waives all rights and defenses that Grantor may have because Borrower's obligation is secured by real property. This means among other things: (1) Lender may collect from Grantor without first foreclosing on any real property collateral pledged by Borrower; and (2) If Lender forecloses on any real property collateral pledged by the Borrower: (A) The amount of the Borrower's obligation may be reduced only by the price for which the collateral is sold at the foreclosure sale, even if the collateral is worth more than the sale price; (B) The Lender may collect from the Grantor even if the lender, by foreclosing on the real property collateral, has destroyed any right the Grantor may have to collect from the borrower. This is an unconditional waiver of any rights and defenses the Grantor may have because the Borrower's obligation is secured by real property. These rights and defenses include but are not limited to any rights and defenses based upon Sections 580a, 580b, 580d, or 580e of the Code of Civil Procedure.

**RELEASE OF RIGHTS.** Grantor understands and agrees that the foregoing waivers are unconditional and irrevocable waivers of substantive rights and defenses to which Grantor might otherwise be entitled under state and federal law. Grantor further understands and agrees that this Agreement is a separate and independent contract between Grantor and Lender, given for full and ample consideration, and is enforceable on its own terms. Grantor acknowledges that Grantor has provided these waivers of rights and defenses with the intention that they be fully relied upon by Lender. Until all indebtedness is paid in full, Grantor waives any right to enforce any remedy Grantor may have against Borrower or any other guarantor, surety, or other person, and further, Grantor waives any right to participate in any collateral for the indebtedness now or hereafter held by Lender.

**GRANTOR'S REPRESENTATIONS AND WARRANTIES WITH RESPECT TO THE COLLATERAL.** With respect to the Collateral, Grantor represents